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SUPREME COURT OF THE UNITED STATES

October Term, 1937

No. 313

LONE STAR GAS COMPANY, *Appellant*,

v.

STATE OF TEXAS, ET AL., *Appellees*

Appeal from the Court of Civil Appeals, Third Supreme Judicial District of Texas

APPELLANT'S REPLY TO APPELLEES' SUPPLEMENTAL BRIEF

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Counsel for Appellant.

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I.

Asserted Estoppel to Urge Interstate Commerce Defense.

In their Supplemental Brief appellees renew their claim that appellant is estopped to urge its interstate commerce defense (pp. 2-5). This contention is fully discussed in appellant's Reply Brief, pp. 7-9. Supplementing what is there presented we submit:

(1) The contention that appellant is not entitled to now rely upon its interstate commerce defense, because that defense was not pleaded before the Railroad Commission, is but another way of saying that this Federal defense was not seasonably raised by the appellant. The Court of Civil Appeals held that this defense was seasonably raised (V, R. 3334-3336). It considered and decided this defense on the merits (V, R. 3336-3352).

It must be said here as it was in *Missouri v. Gehner*, 281 U. S. 313, 320, that "upon the facts disclosed by this record, it is clear that appellant sufficiently raised in the highest court of the State the Federal questions here presented and is entitled to have them considered." Estoppel will not lie in this Court to prevent consideration here of a constitutional defense that is held by the State court to have been seasonably raised in the highest court of the State.

Appellees claim that the present record shows that this defense was not raised before the Commission. The record references made on page 2 of the Supplemental Brief are to statements in the pleadings and statements made by appellant's counsel during the trial of the case in substance making the point that the Commission's opinion and order did not show that the Commission would have promulgated the 32¢ rate and made it applicable to only the intrastate deliveries.

(2) As held by this Court in the Laredo gas case (*United Gas Public Service Co. v. State of Texas*, decided Feb. 14, 1938), and as, in effect, held by the Court of Civil Appeals in the present case (V, R.

3354), the scope of the District Court trial is not limited either by the pleadings or the evidence adduced at the hearing before the Railroad Commission. The order and findings of the Commission are subjected to a review under a trial *de novo*.

The judicial review proceeding is more like that which was provided for in the original Interstate Commerce Act than it is like the judicial review provided for by the Interstate Commerce Act now in effect. As illustrated in *Cincinnati, N. O. & Tex. Pac. R. Co. v. Interstate Comm.*, 162 U. S. 184, and in *Texas & Pacific Ry. Co. v. Interstate Commerce Comm.*, 162 U. S. 197, and as held in *Interstate Commerce Comm. v. Alabama M. R. Co.*, 168 U. S. 144, the trial court, in reviewing an order of the Commission under the original Interstate Commerce Act, was required "to proceed, as a court of equity, to hear and determine the matter and in such manner as to do justice in the premises" (p. 174). There it was held that the parties were free to formulate pleadings in the Circuit Court and to adduce evidence in that court not limited to the evidence previously heard by the Commission. (168 U. S. 175.) That is the Texas rule, as was declared by the Court of Civil Appeals from which the present appeal was taken in *Railroad Commission v. Rau*, 45 S. W. (2d) 413, 415:

"Each party is permitted to introduce such evidence as is pertinent to the controversy, regardless of whether it had been introduced before the Commission, as in all other de novo trials."

II.

Appellant's Line A Business Constitutes Interstate Commerce.

(1) Appellees again contend that the wholesale deliveries made on Line A do not constitute interstate commerce "as a matter of fact." The contention is clearly without merit. Appellant's Line A business constitutes commerce "which concerns more States than one"; it constitutes commerce "among the several States" in a constitutional sense. The express holding of this Court to that effect in *Hanley v. Kansas City Southern Railway Co.*, 187 U. S. 617, has not been departed from in any later case. In that case the Court said:

"The transportation of these goods certainly went outside of Arkansas, and we are of opinion that in its aspect of commerce it was not confined within the State. Suppose that the Indian Territory were a State and should try to regulate such traffic, what would stop it? Certainly not the fiction that the commerce was confined to Arkansas. If it could not interfere the only reason would be that this was commerce among the States. But if this commerce would have that character as against the State supposed to have been formed out of the Indian Territory, it would have it equally as against the State of Arkansas. If one could not regulate it the other could not.

"No one contends that the regulation could be split up according to the jurisdiction of State or Territory over the track, or that both State and Territory may regulate the whole rate. There can be but one rate, fixed by one authority, whether that authority

be Arkansas or Congress. *Wabash, St. Louis & Pacific Railway Co. v. Illinois*, 118 U. S. 557; *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204; *Hall v. De Cuir*, 95 U. S. 485. But it would be more logical to allow a division according to the jurisdiction over the track than to declare that the subject for regulation is indivisible, yet that the indivisibility does not depend upon the commerce being under the authority of Congress, but upon a fiction which attributes it wholly to Arkansas, although that fiction is quite beyond the power of Arkansas to enforce." (187 U. S. 620.)

If Oklahoma could not regulate the movement and delivery of gas over Line A "the only reason would be that this was commerce among the States." And if this commerce had that character as against Oklahoma, then it would likewise have that character as against Texas. "If one could not regulate it," because of the interstate character of the movement, then "the other could not."

It cannot be doubted that the city gate deliveries at Hollis, Oklahoma, constitute interstate commerce. *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298. Why is it that the Texas deliveries have a different character? No reason can be assigned except the fact that the gas is produced in Texas. That fact is important in considering the power of the State of Texas to regulate the production of the gas to promote conservation of natural resources; but it is wholly without effect on the interstate commerce question. *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229.

Appellant, in affirming that its Line A business constitutes interstate commerce, is not relying upon

"a technical legal conception, but a practical one, drawn from the course of business." *Swift v. United States*, 196 U. S. 375, 398. Its Line A business, as actually conducted, is conducted in two States, and, apart from the Commerce Clause, is subject to the regulatory jurisdiction of two States, in the same way and with the same effect as if the line originated in one of the States and simply extended into the other without passing through it. If Line A originated in Oklahoma at the point, say, where it enters the State and otherwise continued, as it does, through Hollis, thence into Texas along its present route, there would hardly be a doubt that the business carried on through that line would be interstate commeree. *Missouri v. Kansas Natural Gas Company, supra.* It does not become internal commerce by adding the segment from Wheeler County, Texas, to the Oklahoma line at its north entrance. If the one is commerce that concerns two States so is the other.

The source of the gas supply is not the distinguishing feature. If it were, then the delivery at Hollis would be interstate and the other deliveries on Line A would be local. The business transacted is not that of selling gas at the well; it is that of transporting to and selling gas at city gates. The service appellant performs is a process that extends into and through two States.

In delivering its judgment in the *Minnesota Rate Cases*, 230 U. S., at page 398, the Court said:

"The words 'among the several States' distinguish between the commeree which concerns more states

than one and that commerce which is confined within one state and does not affect other states."

In *Gibbons v. Ogden*, 9 Wheaton 1, 194, Chief Justice Marshall said:

"The word 'among' means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.

"It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

"Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one."

The commerce here in question "concerns more States than one." Oklahoma is concerned in the same way and to the same extent that she would be concerned if Line A had its origin in Oklahoma and appellant were transporting gas from an Oklahoma gas field to city gates in Texas, serving Hollis, Oklahoma, in passing.

Here, if we put the Commerce Clause out of view, Line A is subject to the separate, equal and independent control of the two States. This applies not only to the rates that may be charged but also to the conditions of service. The Commerce Clause aside, Oklahoma and Texas have equal and independent power to regulate the kind and extent of

service rendered on Line A and the charges that may be exacted therefor. Every fact that supports the regulatory power of Texas exists as well to support the regulatory power of Oklahoma.

There is now only one Oklahoma delivery point on the main line, that at Hollis. But the Commerce Clause aside, Oklahoma may compel the establishing of other delivery points on the main line as well as on the branch line extending north from Oklaunion, Texas. The Oklahoma authorities may compel appellant to extend its lines and increase the service rendered in Oklahoma even to such an extent as will discriminate against the needs and demands of Texas consumers; and they may compel the rendering of this service at rates discriminating against Texas consumers. With the Commerce Clause put out of view, Texas may exercise like and equal authority.

Every probability of conflict in the exercise of authority, due to separate and independent regulation on the part of each of the two States, exists in this case to the same extent and in the same way as in the leading case *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298. Duality of control exists in the same way and to the same extent that it would exist if the movement of gas on Line A took the simplest form of interstate commerce, that is, a movement from one State to another. This duality of control and the resulting probability of conflict in the instant case, as in *Missouri v. Kansas Natural Gas Company*, are due to the fact that the appellant's properties are located in two States and its "integrated" business is being conducted in two States,

subject to the regulatory authority of both States; each being invested with power to regulate appellant's property and business for the purpose of protecting its local interests.

Appellees emphasize the difference between the pipe line transportation of natural gas and railroad transportation of other commodities. That difference is not related in any way to, nor does it grow out of, this "corner of a State" movement. The difference between the pipe line transportation of gas and the railroad transportation existed in *Missouri v. Kansas Natural Gas Company*, 265 U. S. 298, a case involving an ordinary interstate movement, in the same way and to the same extent as in the instant case. This difference was forcibly pointed out in the appellant's brief in that case (265 U. S. 299-301). Presumptively, this difference was carefully considered by this Court and held to be without effect in arriving at a proper determination of the interstate commerce question.

In *Western Union v. Speight*, 254 U. S. 17, the doctrine of the Hanley case was extended and applied to the transmission of intelligence (Main Brief, p. 66). If there be any difference between transportation of gas in a pipe line and transportation of commodities on a railroad, that difference is not so great as is the difference between the transportation of commodities on a railroad and the transportation of intelligence by a telegraph company.

(3) Appellees contend that the prescribed rate operates merely as an "indirect" burden on inter-

state commerce. As to this, we refer to appellant's main brief, p. 79, and its Reply Brief, pp. 12-18.

Nothing that this Court has since said or decided has modified the statement made in the *Minnesota Rate Cases* (p. 401), that "they (the States) have no power * * * * to prescribe the rates to be charged for transportation from one State to another, * * * * *." That has been settled law at least since *Wabash, etc., Ry. Co. v. Illinois*, 118 U. S. 557, was decided, if, indeed, the contrary view had ever theretofore been "the deliberate opinion of a majority of this court." (118 U. S. 575.) Decisions like *South Carolina State Highway Department v. Barnwell Brothers*, (No. 161, October Term, 1937, decided February 14, 1938,) upholding local highway regulation in the interest of public safety and preservation of highways, and *Western Livestock, etc., Co. v. Bureau of Revenue*, (No. 322, October Term, 1937, decided February 28, 1938), upholding a local privilege tax measured by gross receipts, apply other and distinct rules, else the expositions in such opinions were to no purpose. The application appellees attempt to make of the case last cited is wrong. It is obvious that, but for the protection of the Commerce Clause, the cumulative levies of gross receipts taxes mentioned in that case could be here made by the two States.

III.

The Confiscation Issue.

In their latest argument appellees wholly failed to meet the confiscation issue as it is presented in the record.

In appellant's main brief we have summarized the evidence offered by the parties, respectively, on the issue of confiscation (pp. 34-50). At the trial appellant first offered evidence relating to its over-all "integrated" properties and operations; this evidence being in direct rebuttal of the Commission's findings (Appellant's main brief, pp. 34-42). It then attempted to make a segregation of its Texas properties and operations as between interstate and intrastate business (pp. 42-44). The appellees contended that appellant was not engaged at all in interstate commerce in Texas. If appellees were right, then no segregation as between interstate and intrastate commerce was necessary, and the appellees made none. Instead, they offered evidence showing a segregation of appellant's properties and operations as between its business done in Oklahoma and its business done in Texas (Appellant's main brief, pp. 44-50). Under this segregation they assigned 85% plus of appellant's properties to its Texas business.

The Court of Civil Appeals held that appellant was not engaged in interstate commerce in Texas; that all of its Texas deliveries, subjected to the rate order, constituted intrastate commerce. Accordingly, it disapproved appellant's segregation, which was based upon the theory that some of the Texas deliveries were made in interstate commerce (V, R. 3361-2); and further held that, since appellant had failed to make a proper segregation, its evidence "proved nothing material to this case" and was insufficient as a matter of law to show that the rate was confiscatory (V, R. 3361-2). The Court of Civil Appeals fur-

ther held that 85% of appellant's properties were assignable to its Texas business; thus, in effect, approving the segregation made by appellees as between appellant's Oklahoma and Texas properties and operations.

In this state of the record it is manifest that the Court of Civil Appeals erred in holding that because appellant had failed to make a proper segregation as between interstate and intrastate commerce it had wholly failed to "adduce the quantum and character of proof necessary to establish the invalidity of the rate as being confiscatory." (V, R. 3362). This ruling was erroneous for the two reasons pointed out in appellant's main brief, pp. 110-124:

(a) Appellant's evidence relating to its over-all "integrated" properties and operations was in direct rebuttal of the Commission's findings, and appellant was entitled to have its evidence considered as against the findings. If the findings were material, then appellant's evidence in rebuttal of the findings was also material. If appellant's evidence was insufficient as a matter of law, then the findings, following the same theory as did appellant's evidence, were also insufficient as a matter of law to sustain the order.

(b) Furthermore, as is pointed out in appellant's main brief, the evidence taken as a whole laid the basis for a segregation, and presumptively a segregation was made by the jury (Appellant's main brief, 119-124). The Court of Civil Appeals held that none of appellant's business done in Texas con-

stituted interstate commerce. In view of this ruling and the fact that the order applied to all of appellant's Texas deliveries, it was not necessary for appellant to divide its Texas business into two parts, interstate and intrastate. If any segregation at all was needed, it was a segregation between the Texas properties and operations on the one hand, and the Oklahoma properties and operations on the other. That segregation was made by the appellees' evidence. And the Court of Civil Appeals has approved that segregation, including the segregation factor of 85% shown by appellees' evidence. When this segregation factor is applied to the value of appellant's over-all "integrated" properties, as shown by appellant's evidence, the conclusion is inescapable that the rate is confiscatory (Appellant's main brief, 119-124).

Appellees have filed two briefs in this Court and have not noticed this point. Their "General Thesis," (Appellees' brief, 85), is that appellant's evidence considered by itself was insufficient. They, in effect, deny the right of the trial court and jury to consider the evidence offered by the appellees along with the evidence offered by the appellant and to determine from the whole of the evidence whether the prescribed rate was confiscatory.

In briefs previously filed the appellant has discussed the evidence viewed as a whole and has demonstrated that, in many and various ways, the jury might reasonably have interpreted and blended the evidence in such a way as to arrive at a supportable, if not necessary, conclusion that the prescribed rate was confiscatory. (Appellant's main

brief, 147-170; also 34-50; Appellant's Reply Brief, 53-66.) On pages 20 and 21 of their Supplemental Brief appellees state the confiscation issue that is properly before this Court and that "this Court has the undoubted power to determine," but nowhere do they present the pertinent facts, taken from the record as a *whole*, that will enable the Court to determine the issue. Instead, they invite the Court to make "a thorough review and analysis of the entire record" (p. 21). No such analysis of the "entire record" is made even in Appellees' Main Brief. The statement there made amounts to no more than a discussion of the credibility of witnesses and of the weight that may be attached to different phases of conflicting testimony. (Appellees' Main Brief, p. 98, *et seq)*. "Tables" are presented but, as pointed out in Appellant's Reply Brief, these admittedly exhibit only selections from conflicting evidence of certain bases of fact that the jury could have accepted but did not. It is not even claimed that the evidence, considered as a *whole*, was such as to compel the jury to accept as conclusive the interpretations of the evidence presented in these tables.

Appellees greatly emphasize the well known prima facie presumption of validity sustaining the order. This presumption is not irrebuttable. The applicable State statute (Art. 6059) provides how the presumption may be rebutted, that is, by the furnishing of "clear and satisfactory" evidence sustaining the attack on the order. The jury in this case were instructed that the burden devolved on appellant to furnish "clear and satisfactory" evidence showing that the rate was confiscatory (I, R.

194). "Clear and satisfactory" evidence is sufficient, under the State statute, to overturn any and every presumption sustaining the order. And the decisions of this Court show how the presumption of validity may be rebutted, that is, by the furnishing of "clear and convincing" evidence showing that the prescribed rate is confiscatory.

Appellant, in its briefs previously filed, has analyzed the evidence and has demonstrated that the finding of the jury is sustained by "clear and satisfactory" evidence, that is by "clear and convincing" evidence. Instead of attempting to analyze the evidence in an effort to overturn appellant's showing, appellees are content to make general assertions concerning the state of the evidence and to affirm that the evidence showing that the order is confiscatory "must be viewed in the light of the presumption" that sustains the order. The presumption cannot stand in the face of that "clear and satisfactory" evidence that, under the statute and the decisions of this Court, is sufficient to rebut it. If the rule were otherwise, the presumption would be irrebuttable.

The statute requires, in deference to the presumption, that the order must stand, unless overturned by clear and satisfactory evidence. But if there is in the record evidence of that nature that, if believed by the jury, shows confiscation, then the presumption no longer stands in the way of a finding of confiscation. In the face of the jury finding, amply supported by such evidence, the presumption, having spent its force, is now impotent. This Court has said in respect of such a presumption:

"It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right to a trial by jury or take away any of its incidents." *Meeker vs. Lehigh Valley R. Co.*, 236 U. S. 412, 430; *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, 209.

Such also is the holding of the State courts in applying the State statute requiring clear and satisfactory evidence. *Angelina, etc., R. R. Co. v. Railroad Commission*, (Tex. Civ. App., writ of error refused), 212 S. W. 703; *St. Louis, etc., Ry. Co. v. State* (Texas Comm. App.), 255 S. W. 390. In the case last cited the Court said:

"Under article 6658 of the Revised Statutes of Texas, the burden of proof was on the railway companies to show by clear and satisfactory evidence that the apportionment of cost was unreasonable and unjust. But in this case the issue as to whether the apportionment of cost was unreasonable and unjust was one of fact, and not of law. The jury was instructed that before it could find that the order was unreasonable and unjust in this respect, it must so appear by clear and satisfactory evidence. It therefore follows that the trial court did not err in refusing to direct a verdict for the state. The Court of Civil Appeals was without authority to substitute its finding on this issue for that of the jury."

In this case the Court of Civil Appeals, admittedly having no power to substitute its findings of fact for those of the jury (Appellant's Reply Brief, 45-46), has held that as a matter of law the evidence is

insufficient to show confiscation. The question of law is open here as it was in the Court of Civil Appeals. Matters of weight and credibility were for the jury. The law question only is reviewable. The law question decided relates to the "quantum and character" of evidence that is legally sufficient to support a judgment setting aside a rate order as being confiscatory. That question is one arising under the Federal Constitution. It has been wrongly decided, and the decision should be corrected. The judgment of the State appellate court should be reversed, and that of the District Court affirmed, or the cause should be remanded with instructions to reinstate the judgment of the State District Court. *Jones National Bank v. Yates*, 240 U. S. 540, 563.

We wish to again point out that in respect of two of the main phases of the tendered issue of confiscation—the fair value of appellant's property and what would be a fair rate of return—the evidence was admittedly conflicting. The State court so found (V, R. 3363, 3368); and the State court further held that because this conflicting evidence consisted of the testimony of "equally well qualified experts," it was insufficient as a matter of law and of no probative force. With either of these two issues decided in appellant's favor by the jury, the conclusion that the rate was confiscatory was inescapable. This ruling of the State court relates to the quantum and character of evidence required to sustain an attack on a rate order challenged as confiscatory under the Federal Constitution. The ruling is clearly wrong and should be corrected.

IV.

Discussion of Other Points and Statements Made by Appellees.

(1) *Appellant's alleged failure to submit segregation evidence to the Commission.*

Appellees complain of appellant's alleged failure to submit evidence to the Commission upon which it could have made a segregation of the property and business between interstate and intrastate commerce or between Texas and Oklahoma public service, here again making a negative use of the excluded Commission record (Appellant's Reply Brief, 3-4). They say that the record shows that appellant was working "hammer and tongs" upon a segregation theory during the time the Commission's hearings were going on. (Appellees' Supplemental Brief, p. 8.) The record does not support the latter statement. In support of the statement, reference is made to page 71 of appellees' main brief. Appellees there state that the gravitometer readings were commenced in 1933 in preparation of the court hearing. The record does not support this conclusion. The record shows that appellant maintains and operates recording gravitometers for making continuous record of the specific gravity of the gas transported and sold by it. The dates upon which these various gravitometers were installed are not shown in the record. The function of these instruments was explained by the witness Schmidt. He testified that the charts are taken off the gravitometers and included in the com-

pany's records; and that those records are available to the State of Texas and the Railroad Commission. (II, R. 1505-1506.)

The Commission could have made the same character of segregation before promulgating the order that it made in the District Court in an effort to sustain the order. The basis of such a segregation was laid in the evidence as to the over-all property and business. Moreover, the Commission could have limited its order to gas delivered in intrastate commerce. If it had done this the issue would have been confined to the validity of the order when applied solely to the intrastate deliveries of gas. But the Commission made the order applicable to all deliveries of gas whether made in interstate or intrastate commerce. It was not open to appellant to control the drawing of the order. The evidence shows that the order was not drawn until long after the hearing was terminated.

In as much as the order in its operation is inseparable, it is not material that appellant's business may be separable into two parts, interstate and intrastate. *Cooney v. Mountain States Telephone Co.*, 294 U. S. 384, 392; *Pacific Telephone & Telegraph Co. v. Washington*, 297 U. S. 403, 416. The order is an indivisible legislative act. It has been so drawn, so interpreted and so enforced by the Commission and the State court (Appellant's main brief, 97-104).

This is a stronger case for the inseparability of the involved legislative act than is the ordinary case involving a statute. See *Cooney v. Mountain States Telephone Co., supra.* Statutes are not supported by findings of fact. This rate is purportedly supported

by elaborate findings of fact (I, R. 14-116). These findings include the Line A properties and operations. As we have already pointed out in detail, the findings of the Commission and those of the State appellate court show that, with the Line A properties and operations eliminated, the order would not have been promulgated by the Commission because, with Line A eliminated, the prescribed rate would not have yielded the 6% which the Commission found was the "minimum" rate to which the appellant was entitled. This clearly appears from the Commission's findings considered in the light of the trial evidence and the findings of the State appellate court (Appellant's main brief, 101-103).

(2) *The quantity of Oklahoma gas transported to Texas.*

Appellees say that the total volume produced from company reserves in Oklahoma and transported to Texas was only 613,780 MCF for the year 1933. They then make the point that for the same period approximately 500,000 MCF of gas from Oklahoma and the Texas Panhandle was stored in the Miller lease. (Appellees' Supplemental Brief, p. 9.) Appellees, on Exhibit 4 (III, R. 2124-A), show under the heading "Gas Purchased and Produced—Oklahoma" that the total gas transported from Oklahoma to Texas for 1933 amounted to 1,267,775 MCF of gas. The 613,780 MCF referred to in Appellees' Brief was gas produced from appellant's own reserves and excluded the gas *purchased* by appellant in Oklahoma and transported to Texas. The amount

of gas transported from Wheeler County, Texas, through Oklahoma and thence back into Texas and delivered at Texas city gates amounted to 6,113,200 MCF of gas for the year 1933. The amount transported for other years is shown in the record. (Appellant's Exhibit 44, V, R. 3201-3205.)

Here the appellees again refer to the alleged storage of the "smaller volume of Texas Panhandle gas coming through Line A" in the Miller lease (Brief, p. 9). The figures given by appellee show that the amount of Line A gas thus stored must be very small—negligible—when compared with the total deliveries on that line. Furthermore, as pointed out in our Reply Brief, this storage is, of course, without effect on the gas delivered on Line A and consumed long before the Miller lease is reached (Reply Brief, p. 26).

(3) *Average operating results.*

Appellees complain that the trial court did not specifically instruct the jury that they might take into consideration average operating results from January 1, ~~1937~~, to April 30, 1934, in arriving at their verdict on the issue of confiscation (Supplemental Brief, p. 18). This objection to the court's charge was not made in the trial court (I, R. 182-4); it is made for the first time in this Court. It therefore obviously comes too late. Furthermore, the objection is clearly without merit. The jury were permitted to consider the average operating results mentioned, as clearly appears from the record:

(a) Appellees' accounting Exhibit 4 shows appellant's earnings upon the Texas operations only from

1929 through March 31, 1934 (III, R. 2116-A). Appellees' Exhibit 5 shows the operating income, expenses and the net earnings for the years 1927 through March 31, 1934 (III, R. 2126-A). These exhibits were received in evidence and were available for consideration by the jury. The charge contained no instruction preventing the jury from considering this evidence. On the contrary, the jury was instructed that they should answer the single special issue submitted to them "from the evidence introduced before you" (I, R. 192); and in the special issue the jury was required to find "from the evidence in this case" whether the rate was confiscatory (I, R. 194). The exhibits referred to constitute a part of the evidence "introduced before" the jury and therefore a part of the evidence on which they were *required* by the charge to base their answer.

(b) The opinion and findings of the Railroad Commission were received in evidence and the jury were specifically instructed that they might consider the findings and conclusions of the Commission for the purpose of assisting them in determining whether the order was unreasonable and unjust (Charge, I, R. 194). The opinion and findings of the Commission set out in great detail the earnings of appellant for the years 1927 through 1932, and undertake to demonstrate the amount that would have been available to appellant for return under the 32¢ rate if it had been in effect during each of those years (Opinion and Findings, I, R. 105-106). The order was not applied to any period prior to its effective date, to-wit, September 13, 1933, but the jury were at liberty to take into consideration in determining

whether the order, when applied prospectively, would be confiscatory in the light of earnings for prior years. The earnings for these prior years were in evidence, and, presumptively, the jury gave them due and proper weight. It therefore affirmatively appears that appellees erroneously stated that,

"Thus, the jury's vision was limited strictly by the form of submission to the question whether the rate was unreasonable prospectively from the date of trial in 1934, forward, and the jury was not permitted to answer as to whether it was reasonable when considered in the light of the average operating results * * * * from 1927 to 1934, inclusive." (Appellees' Supplemental Brief, p. 18.)

The findings of the Railroad Commission, put in evidence before the jury, expressly showed that the Commission had considered the average operating results in question in testing the proposed rate and in determining whether, in the view of the Commission, it would operate in a reasonable way. The jury was expressly instructed that it could consider the findings of the Commission in connection with the trial evidence in deciding the ultimate issue as to whether the rate was confiscatory. In these circumstances, it must be presumed that the jury, following the charge, duly considered these average operating results in arriving at the conclusion that the rate was confiscatory.

(4) *Canceled and surrendered leases and Federal income taxes.*

Appellees erroneously state that in the table appearing on page 64 of Appellant's Reply Brief can-

celed and surrendered lease expense was not handled in the manner in which the Commission handled it. The Commission amortized this expense on a five-year basis. We have done likewise in the table referred to. (See note 1, p. 64, Appellant's Reply Brief.) In this table we have handled operating expenses in the same manner as the Commission treated them. The items eliminated by the Commission have been eliminated and the items amortized by the Commission have been amortized. (For details, see IV, R. 2297-2304.)

Federal income taxes have been correctly computed by appellant. Appellees' criticism is without merit (Appellees' Supplemental Brief, p. 23). The evidence shows that the amount of Federal income tax allocable to appellant upon the consolidated return amounted to $296,954.64 for 1931 and $234,312.46 for 1932 (I, R. 395).

Appellees' statement that "Hulcy testified that only an amount of approximately $52,000.00 would be due by the company for the year 1931 * * *" (Appellees' Supplemental Brief, p. 23) is inaccurate. The testimony here referred to was given in response to the cross-examination by appellees' counsel. The witness Hulcy stated that if the 32¢ rate had been in effect and appellant had been allowed five per cent of the rate base adopted by the Commission as depreciation and depletion reserve accruals, and the total amount paid for interest had been deducted, the income tax would have amounted to approximately $50,000.00 (I, R. 406).

Most of the contentions made in Appellees' Supplemental Brief have been anticipated and discussed in

Appellant's Reply Brief. We do not desire to repeat what has there been said; nor do we undertake herein to answer all of the statements made in Appellees' Supplemental Brief with which we do not agree. We think the appellant's position in respect to all material phases of the case have been sufficiently presented in the other briefs.

Respectfully submitted,

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